IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH

v.

WINFRED OVERHOLSER, SUPERINTENDENT, ST. ELIZABETHS HOSPITAL, WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE

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Interest of Amicus Curiae

This brief is being filed pursuant to Rule 42 with the written consent of both petitioner and respondent. The American Civil Liberties Union believes that this case involves not only a serious deprivation of due process—a subject in which the amicus' interest is great—but also presents issues that are of far-reaching significance with respect to the law of criminal responsibility in the District of Columbia and in which the amicus has had an abiding concern.

In 1954, in *Durham* v. *United States*, 214 F.2d 862, the Court of Appeals for the District of Columbia Circuit broke dramatically with the past by adopting a new standard for determining when a defendant should be acquitted of a crime on grounds of insanity. Prior to *Durham*, the standard in the District of Columbia was the traditional M'Naghten Rule—whether the accused knew the difference between right and wrong and appreciated the nature and quality of his act—supplemented by the "irresistible impulse" corrolary. See *M'Naghten's Case*, 10 Cl. & Fin. 200, 210 (H.L. 1843); *Guiteau's Case*, 10 Fed. 161, 12 D.C. (1 Mackey) 498 (1882); *Smith* v. *United States*, 36 F.2d 548, 549 (1929). As articulated in *Durham*, the question in the District of Columbia is now simply whether the accused's "unlawful act was the product of mental disease or mental defect." The purpose of this innovation, as one leading student of *Durham* has expressed it, was "to reconcile the rule of responsibility with advances in medical knowledge, and to broaden the class of persons who would be treated instead of punished; more particularly, it was framed to facilitate communication between psychiatric experts and the courts which was being impeded by the pre-existing tests." Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 Yale L.J. 905 (1961).

Apart from the State of New Hampshire, where a rule similar to *Durham* had been adopted in 1871, see *State* v. *Jones*, 50 N.H. 369, and also *State* v. *Pike*, 49 N.H. 399, 408 (1869), the District of Columbia was the first jurisdiction in the United States to abandon the ancient rules of criminal responsibility. However, in contrast to the New Hampshire insanity doctrine, which has lain "dormant—ignored, misunderstood, and generally viewed as the

peculiar eccentricity of a one-horse state,"[1] the *Durham* decision has provoked intense interest and widespread comment.[2] Nor has this interest been confined to academic circles. On the contrary, court after court has been urged to adopt the *Durham* rule or something akin to it,[3] and the District of Columbia courts have labored diligently in working out the ramifications of Durham. One index to the magnitude of that task is the fact that, since 1954, the Court of Appeals has handed down more than 80 opinions dealing with various aspects of the insanity defense.[4]

Thus it is plain that the courts of the District of Columbia are engaged in a critically important pioneering effort to provide newer and more satisfactory answers to some of the most complex problems of the criminal law: the nature of criminal responsibility as it is affected by the mental illness of the defendant; the causal relation between particular mental illnesses and crime; the type of evidence relevant to establish mental illness; and the respective functions of the court and the jury in deciding these ques-

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[1] Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 Yale L.J. 367 (1960).

[2] For a sampling of the literature in the field, see Hall, *Psychiatry and Criminal Responsibility*, 65 Yale L.J. 761 (1936); Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 Colum. L. Rev. 183 (1958); Weihofen, *The 'Test' of Criminal Responsibility: Recent Developments*, 172 Int'l Record of Medicine 638 (1959); *Insanity and the Criminal Law—A Critique of Durham v. United States*, 22 U. Chi. L. Rev. 317 (1955); Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham and Beyond*, 41 A.B.A.J. 793 (1955). And for articles particularly relevant to the issues presented in the case at bar, see Krash, *op. cit. supra*; Halleck, *The Insanity Defense in the District of Columbia—A Legal Lorelei*, 49 Geo. L.J. 294 (1960); and Goldstein and Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 Yale L.J. 225 (1960).

[3] Most have declined the invitation. See cases cited in Krash, *op. cit. supra*, p. 906 n. 8. But see *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961), and 14 V.I. Code Ann. § 14 (1957).

[4] See Krash, *op. cit. supra*, pp. 906-907.

tions. Lest what we say in this brief leave any impression that we regard these developments in the District of Columbia as undesirable, we wish to record at the outset our view that *Durham* and the effort that has been devoted to its application constitutes one of the most heartening developments in decades in the jurisprudence of criminal law. In voicing this conviction, we are but echoing the opinions of the many distinguished persons who have questioned the wisdom of adhering to a principle of criminal responsibility that was established well over a century ago when science had hardly begun its exploration of the mysteries of the human mind.

In 1928, for example, Mr. Justice Cardozo called for a definition of insanity "that will combine efficiency with truth," and characterized the M'Naghten Rule, a "definition that palters with reality," as representing "neither good morals nor good science nor good law." Cardozo, *What Medicine Can Do For Law*, from Law and Literature and Other Essays and Addresses (1931), p. 108. Mr. Justice Frankfurter also expressed his disapproval of adherence to *M'Naghten* during his testimony before the Royal Commission on Capital Punishment. He stated in part:

> "I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated. . . . If you find rules that are, broadly speaking, discredited by those who have to administer them, which is, I think, the real situation, certainly with us . . . then I think the law serves its best interests by trying to be more honest about it. . . . They are in large measure abandoned in practice, and therefore I think the M'Naghten Rules are in large measure shams. That is a strong word, but I think the M'Naghten Rules are very difficult for

> conscientious people and not difficult enough for people who say, 'We'll just juggle them.' . . . I dare to believe that we ought not to rest content with the difficulty of finding an improvement in the M'Naghten Rules. . . ." Report, Royal Commission on Capital Punishment (1953), p. 102.

See also Chief Judge Biggs' opinion for the court in *United States* v. *Currens*, 290 F.2d 751 (1961), where the Court of Appeals for the Third Circuit, referring to the "vast absurdity of the application of the M'Naghten Rules," *id.*, at 766, followed the lead of *Durham* in rejecting the traditional tests.[5] And see Mr. Justice Douglas' criticism of the M'Naghten Rule and his favorable appraisal of the Durham Rule in his article, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 Iowa L.Rev. 485 (1956).

While the *Durham* decision represented a giant stride forward, however, it also generated a host of complicated subsidiary problems. In view of the troublesome nature of these questions with which the Court of Appeals has

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[5] The *Currens* court, however, adopted a formula that it believed would give more guidance to the jury than *Durham*: Whether the defendant "at the time of committing the prohibited act . . . , as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated." *Id.*, at 774. The court said that this test was "based primarily" on the American Law Institute proposal, which reads as follows:

> "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
>
> "(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." Model Penal Code § 4.01 (Tent. Draft No. 4, 1955).

This test, with one or another variation, appears to be gaining support. See Ill. Rev. Crim. Code 6-2 (1961); Vt. Stat. Ann. 13-4801 (1958); H.R. 7052, 87th Cong., 1st Sess. (1961).

had to grapple, we believe that the decisions of the Court have generally reflected wisdom and an appropriate recognition of the necessarily tentative and experimental nature of the answers that could be given. Nonetheless, in any venture so bold and significant as this one, there is a serious risk that, at some point, not only may the courts go awry, but they may do so in a manner that sacrifices critically important elements of human freedom. Regrettably, that risk has been realized in the case at bar, and it is for that reason that this Court is called upon to mark the outer limit of the experimentation.

Moreover, while the vindication of petitioner's rights is sufficient reason for this Court to act, we believe it appropriate to note our belief that the manner in which the Court disposes of this case may well have a significant effect for good or ill upon the Durham Rule. To be sure, the issues raised in this case do not relate directly to the meaning and application of *Durham*. Rather, the question here concerns the proper role of the state with respect to a person who has been acquitted on the basis of that rule. Still, it would blink reality to deny that the standards governing commitment upon an acquittal by reason of insanity bear significantly upon the workability of the Durham Rule. If those standards are unreasonably stringent, persons who would be entitled to an acquittal by reason of insanity may be reluctant to raise the defense. On the other hand, if the standards are unreasonably lax, juries may be overly chary of acquitting defendants on grounds of insanity because of a belief that this would seriously jeopardize the security of the citizens of the District of Columbia.[6] Consequently, the task of

[6] The Court of Appeals has recognized this factor and has held that the jury should be instructed as to the consequences of an acquittal on grounds of insanity. See *Taylor* v. *United States*, 222 F.2d 398, 404

Congress in formulating rules of commitment and release and of the courts in interpreting and applying them is of critical importance to the integrity of the Durham Rule.

Questions Presented

In factual terms, the fundamental question in this case is whether a person charged with a non-violent misdemeanor who is represented by counsel and who wishes to enter a guilty plea may instead be acquitted on grounds of insanity and then automatically committed to and confined in a mental institution. In legal terms, the issues may be stated as follows:

1. Is the mandatory commitment provision of the D. C. Code, section 24-301(d), as it has been construed by the Court of Appeals, invalid under the Due Process Clause of the Fifth Amendment?

2. Is the provision of the D. C. Code, section 24-301(e), that governs the release of persons committed under section 24-301(d) after an acquittal by reason of insanity, as it has been construed by the Court of Appeals, invalid on its face under the Due Process Clause of the Fifth Amendment?

3. Are either or both of these provisions unconstitutional under the Due Process Clause of the Fifth Amendment as they are applied to a person charged with a non-violent misdemeanor who wishes to plead guilty?

4. Was the trial judge required by Rule 9 of the Munici-

(1955); *Lyles* v. *United States*, 254 F.2d 725, 728, 734 (1957), *cert. denied*, 356 U.S. 961; *Catlin* v. *United States*, 251 F. 2d 368 (1957).

It may also be noted that some courts have been deterred from adopting the Durham Rule because of a belief that post-acquittal confinement procedures outside the District of Columbia are inadequate. See *e.g.*, *Sauer* v. *United States*, 241 F.2d 640, 650 (9th Cir. 1957), *cert. denied*, 354 U.S. 940.

pal Court Rules to accept petitioner's plea of guilty because it was made voluntarily, with full knowledge of consequences, and with the advice of counsel?

5. Was it an abuse of discretion on the part of the trial judge to refuse to accept such a plea?

6. Should sections 24-301(d) and 301(e) be construed to be inapplicable where the accused wishes to plead guilty?

7. Should those provisions be construed to be inapplicable where the crime charged was not one of violence?

8. Under the Due Process Clause of the Fifth Amendment, should psychiatric testimony have been made available to petitioner at the expense of the Government?

9. Was petitioner deprived of notice adequate to satisfy the Due Process Clause of the Fifth Amendment that the issue of sanity was to be litigated at the trial?

10. Was petitioner deprived of the right to counsel guaranteed by the Sixth Amendment?

Statutes, Rule, and Constitutional Provisions Involved

The applicable constitutional and statutory provisions and the relevant rule of procedure are set forth in the Appendix, *infra*, pp. 61-64.

Statement

At issue in this case is the validity of petitioner's confinement in St. Elizabeth's Hospital. The circumstances relevant to this issue are as follows:

On November 6, 1959, two informations were filed against petitioner in the Municipal Court for the District of Columbia, charging him with violations of the District's Bad Check Law, D. C. Code 22-1410. (R. 22, 26). More specifically, the charge was that, on two occasions,

petitioner had drawn checks of $50.00 knowing he did not have sufficient funds in his account to cover them, and that he had not made these checks good within five days after receiving notice that they had not been honored by his bank.

Pursuant to section 24-301(a) of the D.C. Code, see *infra*, p. 61, the Municipal Court ordered petitioner committed to the District of Columbia General Hospital for examination to determine his mental competency to stand trial. (R. 21, 25) On December 4, 1959, the Assistant Chief Psychiatrist of the Hospital reported to the court that petitioner was not competent to stand trial because he was "of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense." The psychiatrist stated that petitioner had "shown some improvement," but "recommended that he be committed to a psychiatric hospital for further care and treatment." (R. 23) The court, upon the basis of this report, ordered petitioner's commitment continued. (R. 21)

On December 28, 1959, the Assistant Chief Psychiatrist of the General Hospital sent another report to the court, stating that petitioner had "shown some improvement and at this time appears able to understand the charges against him, and to assist counsel in his own defense." The psychiatrist went on to state that in his opinion petitioner "was suffering from a mental disease, *i.e.*, a manic depressive psychosis, at the time of the crime charged. Such an illness would particularly affect his judgment in regard to financial matters, so that the crime charged would be a product of this mental disease." Furthermore, said the psychiatrist, petitioner was "in an early stage of recovery," and therefore it was "possible that he may have further lapses of judgment in the near future." He

concluded, "It would be advisable for him to have a period of further treatment in a psychiatric hospital." (R. 24).

The trial was held the following day. The only notation in the record regarding representation by counsel indicates that petitioner waived counsel (R. 21), but it is conceded that counsel was ultimately appointed before the trial.[7]

Prior to the trial, a not guilty plea had been entered. (R. 19) It is not clear from the record whether the court entered this plea for defendant—the most reasonable presumption since the court had doubts about petitioner's competency—or whether defendant entered it himself. In any event, it seems clear that it was entered at a time when he was, according to the government psychiatrist, incompetent to act for himself in a legal proceeding, and when he was unrepresented by counsel.

At the trial, petitioner, through his counsel, attempted to enter a plea of guilty. However, despite the fact that petitioner had been found competent to stand trial, the trial judge refused to permit the entry of this plea. (R. 19) The judge thereupon heard evidence over petitioner's objection. (R. 19) Part of the evidence submitted by the government was the testimony of a physician from General Hospital who testified that petitioner was competent to stand trial, but also that the crimes of which he was charged were the product of his mental illness. (R. 19) Petitioner offered no evidence of any kind.[8] (R. 19) At the conclusion of the trial, the judge found petitioner not guilty by reason

[7] Petitioner, in his brief before the Court of Appeals, represented that this delayed appointment of counsel is the practice in the Municipal Court in cases of this nature, and this representation was not denied by the Government.

[8] The Court of Appeals stated that "it appears appellee took the stand and denied essential elements of the crimes. . . ." 288 F. 2d, at 390. We cannot, however, find support for this statement in the District Court's findings.

of insanity, and thereupon ordered him committed to St. Elizabeth's Hospital pursuant to section 24-301(d) of the D. C. Code.[9] See p. 62, *infra*. The judge conducted no hearing and made no finding as to petitioner's then existing mental condition.

On June 13, 1960, petitioner attacked the validity of his confinement in St. Elizabeth's by filing a petition for habeas corpus in the District Court for the District of Columbia. The petition rested upon a number of grounds, among which were the following: (1) deprivation of due process by the trial court's refusal to accept petitioner's guilty plea; (2) deprivation of due process by virtue of the confinement being based solely upon reasonable doubt as to his sanity as of a previous date; (3) deprivation of due process by virtue of the onerous release standards of section 24-301(e); and (4) application of section 24-301(e) to a situation not properly within its scope, *i.e.*, a case where the defendant had not raised an insanity defense. (R. 3-6)

A hearing was held before Judge McGarraghy on June 16, 1960. (R. 12) The Court ruled in petitioner's favor, stating:

> "[T]he Municipal Court lacked jurisdiction to effect such a commitment and thereby permit the government to obtain commitment of the petitioner as of unsound mind by use of a criminal proceeding in substitution for civil commitment procedures established by law: . . ." (R. 20)

On the basis of this ruling, the judge ordered that petitioner be discharged from St. Elizabeth's unless civil commitment proceedings were instituted within ten days. (R. 20)

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[9] The finding was not phrased in the language of section 301(d), which refers to an acquittal "solely" on grounds of insanity.

On appeal, the Court of Appeals, sitting *en banc*, reversed this judgment, rejecting all of petitioner's arguments. Judge Fahy, joined by Judges Edgerton and Bazelon, filed a dissenting opinion in which he said the judge's refusal to accept the guilty plea posed a "most difficult question," but one that need not be reached because in any event (1) the record disclosed too great a possibility that petitioner had not been given fair notice that the insanity issue would be litigated at the trial, and (2) the confinement provisions of the statute, properly construed, excluded the continued custody of a person without invocation of civil commitment procedures unless the crime with which he had been charged involved violence to person or perhaps to property.

Summary of Argument

While there are broad constitutional issues presented in this case, and while we believe that, if decided, they should be resolved in petitioner's favor, we also believe that the case may more appropriately be disposed of upon narrower grounds. Nonetheless, since the Court would have to reach the constitutional questions if it were to reject our argument on the non-constitutional issues, and since the latter can be weighed judiciously only in the context of the former, we address ourselves first to the constitutional questions.

I

Section 24-301(d) of the D. C. Code, as construed by the Court of Appeals, is unconstitutional on its face. Under that provision, an acquittal on grounds of insanity results automatically in commitment to a mental institution. As this case demonstrates, the Court of Appeals has construed the statute to be applicable regardless of

the nature of the crime charged. The result is that a person charged with a non-violent misdemeanor is committed solely upon the basis of a reasonable doubt as to his mental health at a prior time—for this is all that is implied by an acquittal on grounds of insanity, *Ragsdale* v. *Overholser*, 281 F.2d 943, 947 (D.C. Cir. 1960)—and without any hearing or opportunity to establish his present sanity. This irrebutable presumption of continued mental disease is so irrational as to offend the principle of *Tot* v. *United States*, 319 U.S. 463, 467-468 (1943); and, in the context of so serious a deprivation, the commitment procedures are so arbitrary as to offend due process. Moreover, since these procedures have no overtones of punishment, *Hough* v. *United States*, 271 F.2d 458, 462 (D.C. Cir. 1959), there is no adequate basis for distinguishing the acquitted defendant from the ordinary citizen. Consequently, in view of the elaborate procedural safeguards surrounding a civil commitment, D.C. Code, 21-306 *et seq.*, there is a violation of the principle of equal protection that is reflected in the Due Process Clause of the Fifth Amendment, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

We fully recognize the interest of society in protecting itself, and, moreover, we believe that the workability of the rule of *Durham* v. *United States*, 214 F.2d 862 (1954) (guilt turns upon whether or not the "unlawful act was the product of mental disease or mental defect") depends upon the existence of commitment procedures well calculated to secure that interest. However, there are practicable alternatives to section 301(d). For example, the trial judge could conduct a hearing and make a finding immediately after acquittal as to the desirability of commitment, based upon the trial testimony and the psychiatric report made in connection with the determination of

defendant's competency to stand trial, as well as upon whatever other evidence might be available. And the practicability of alternatives is itself relevant to the resolution of the constitutional question. *Shelton* v. *Tucker*, 364 U.S. 479, 488-489 (1960).

Moreover, the provision governing the release of persons committed pursuant to section 301(d), namely, section 301(e), as construed by the Court of Appeals, is also unconstitutional on its face. In order to secure his release, the individual must establish beyond a reasonable doubt that he has recovered his sanity and that he is no longer dangerous. *Ragsdale* v. *Overholser*, 281 F.2d 943, 947 (D.C. Cir. 1960). Thus he is committed on the basis of a reasonable doubt and cannot free himself because of a reasonable doubt, even though his crime may have been merely overtime parking. Imposition of an unreasonable burden of proof may constitute a deprivation of due process, *Speiser* v. *Randall*, 357 U.S. 513 (1958); and, under these circumstances, we submit that it does.

Furthermore, the invalidity of section 301(e) is accentuated by virtue of the fact that it is not sufficient that the individual prove beyond a reasonable doubt that he is not insane or even that he is not suffering from mental disease or defect. He must also prove that he is free from some less serious type of malady—in the words of the Court of Appeals, "such abnormal mental condition as would make [him] . . . dangerous to himself or the community in the reasonably foreseeable future." *Overholser* v. *Leach*, 257 F.2d 667, 670 (D.C. Cir. 1958). In *Leach*, the individual was "a sociopathic personality with dyssocial outlook," and it is well established that such individuals seldom respond to treatment. Thus this statute lays the basis for lifelong confinement in an insane asylum of a person who has not committed a felony or even a misdemeanor

of violence but who cannot convince the court beyond a reasonable doubt that he does not suffer from an "abnormal mental condition" that might make him dangerous, and that dangerousness may be merely that he might once again dump his garbage in the street to spite his neighbor.

These statutory provisions are, at any rate, plainly unconstitutional as applied to petitioner. In the first place, it cannot be argued that petitioner knowingly and willingly accepted the consequences of his acquittal on grounds of insanity, since he attempted to enter a plea of guilty. Thus, whatever weight a waiver theory might have where the defendant raises the insanity defense, this is not such a case. And in the second place, petitioner's crime was not one of violence, and consequently society's interest in protection against him is related only to property interests, not to interests of personal safety. In short, whatever might be said in justification of the statute when applied to a person who seeks and secures an acquittal in a murder or rape case on grounds of insanity cannot be said here.

IV

There are several non-constitutional grounds for reversing the judgment that would enable the Court to avoid decision of the constitutional questions.

A. First, the trial judge erred in refusing to accept the guilty plea. Rule 9 of the Municipal Court Rules, which is identical to Rule 11 of the Federal Rules of Criminal Procedure, should be construed to require the court to accept such a plea if made voluntarily and with knowledge of the consequences. While the language of the Rule is ambiguous, see *infra*, p. 64, the authorities cited in petitioner's brief establish that historically courts have regarded themselves as free to reject a tendered guilty plea

only where there was doubt as to whether the defendant was acting with full awareness. In the light of this background, the Rule's meaning becomes clear.

In any event, assuming *arguendo* that the trial judge had some discretion beyond such a situation, that discretion was abused in this case. The interest of the defendant in entering the plea was strong, in view of the grave consequences of an acquittal on grounds of insanity as compared with the relatively light sentence that would have been imposed. Under such circumstances, the state's interest in seeing that convictions are unquestionably correct cannot displace the defendant's choice, since that interest derives its greatest value from the protection it gives to the person accused, and in this case such "protection" was but an illusion. Moreover, rejection of our argument would open the door to grave abuse, for the prosecution would then be in a position, under the guise of "doing justice," to seek in misdemeanor cases a confinement that would probably exceed greatly the sentence that could be imposed; and this could be accomplished in many cases with great ease because, where the defendant seeks to avoid commitment, the roles are reversed and he must prove his sanity beyond a reasonable doubt. Acceptance of our position, on the other hand, would accord with the rule in other jurisdictions that only the accused may raise an insanity defense. *Boyd* v. *The People*, 108 Colo. 280, 294, 116 P.2d 193 (1941); *Rex* v. *Oliver*, 6 Cr. App. 19, 20 (1910); Report, Royal Commission on Capital Punishment, § 443 (1953).

B. The statutory provisions should be construed to be inapplicable either (1) where the defendant does not raise the insanity defense or wishes to plead guilty or (2) where the crime charged is a non-violent misdemeanor.

The statutory language does not expressly provide whether commitment and confinement should follow an

acquittal by reason of insanity regardless of who injects the insanity issue into the case, and hence our suggested construction may be adopted so as to reduce constitutional doubts. Moreover, it should be noted that a literal reading of the statute would not support the Government either. The statute requires that for commitment to take place, the defendant be acquitted because "he was insane," section 24-301(d), and that for release to be authorized, he have "recovered his sanity," section 24-301(e). Thus, read literally, the statute sanctions commitment and confinement only where there is a finding of insanity, and, as we have indicated, an acquittal on grounds of insanity constitutes no such finding. Thus, "if we are to interpret §24-301 more broadly than its literal meaning, we should not go so far beyond its literal meaning as to raise serious constitutional doubts." *Overholser* v. *O'Beirne*, — F.2d — (Oct. 19, 1961), slip op., p. 23 (dissenting opinion of Judge Edgerton). Furthermore, the legislative history supports our proposed construction. See Report of the Committee on Mental Disorder, reprinted in House Report No. 892, 84th Cong., 1st Sess., p. 13 ("where the accused has pleaded insanity as a defense" the commitment procedure is "just and reasonable"). Finally, Congress should be presumed to have legislated with knowledge of the established rule that guilty pleas knowingly tendered are to be accepted.

In the alternative, a reading of the statute that would restrict its application to situations involving crimes of violence is perfectly plausible. The wording of section 301(e), by referring to the necessity of showing that the individual will not be "dangerous" to himself or others if released, suggests such an interpretation, as the dissenting judges below pointed out. Moreover, such a construction would reduce the constitutional problems, since

society's interest in confinement would then be greater. Finally, again the legislative history affords support for our position. See Report of the Committee on Mental Disorder, reprinted in House Report No. 892, 84th Cong. 1st Sess., p. 13 (refers to the need to prevent occurrences such as those where, because of premature release, persons acquitted elsewhere on grounds of insanity had "commit[ted] some further serious crime, many of them involving rape and/or murder").

V

There are three other alternative grounds for reversing the judgment.

A. First, psychiatric evidence at Government expense should have been made available to petitioner, who was indigent, on the principle of the line of cases including *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Farley* v. *United States*, 354 U.S. 521 (1957), *Ellis* v. *United States*, 356 U.S. 674 (1958); *Eskridge* v. *Washington Prison Bd.*, 357 U.S. 214 (1958); and *Smith* v. *Bennett*, 365 U.S. 708 (1961).

B. Second, the record does not afford sufficient support for the usual presumption of regularity of proceedings, in that it is probable that petitioner did not receive adequate notice that the issue of insanity was to be litigated. The reason, of course, is that neither he nor his counsel had any reason to suspect that the court would decline to accept the guilty plea.

C. Finally, the record discloses that the petitioner was deprived of his right to counsel, in that no counsel was appointed for him during the important pre-trial stages of confinement and examination. While this issue was not presented in the petition for habeas corpus or in the petition for certiorari, we know of no jurisdictional bar to

the Court's considering it. See Rule 40 (1)(d)(2). Moreover, the error is not only plain, but affects constitutional rights.

ARGUMENT

I. Statutory Background

The legislation that is involved in this case was not in effect when *Durham* was decided. At that time, the pertinent District of Columbia statute provided only that the court, upon a person's acquittal by reason of insanity, had the discretion to notify the Secretary of Health, Education, and Welfare, who in turn could order hospital confinement for that person. D. C. Code, 24-301 (1951).[10] In 1955, however, in the wake of *Durham* and related decisions, Congress passed legislation comprehensively regulating the procedures to be followed in the District of Columbia both before and after trial where an insanity question is involved.[11] 69 Stat. 609. The portions of that legislation that are involved in this case are sections 301(d) and 301(e) of the District of Columbia Code, Title 24, which govern both the commitment and the subsequent release of a person found not guilty by reason of insanity. These sections provide in pertinent part as follows:

> "(d) If any person tried . . . for an offense . . . is acquitted solely on the ground that he was insane at

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[10] It was the customary practice of the courts to invoke this provision. See Report of the Committee on Mental Disorder, reprinted in H. Rep. No. 892, 84th Cong., 1st Sess., p. 12.

[11] The other decisions listed by the House and Senate Reports as having been scrutinized with care were *Tatum* v. *United States*, 190 F. 2d 612 (1951); *Wright* v. *United States*, 215 F. 2d 498 (1954); *Gunther* v. *United States*, 215 F. 2d 493 (1954); *Contee* v. *United States*, 215 F. 2d 324 (1954); *Wear* v. *United States*, 218 F. 2d 24 (1954); and *Taylor* v. *United States*, 222 F. 2d 398 (1955). H. Rep. No. 892, 84th Cong., 1st Sess., p. 3; S. Rep. No. 1170, 84th Cong., 1st Sess., p. 2.

the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

"(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) . . . and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital . . . such certificate shall be sufficient to authorize the court to order the unconditional release of the person . . .; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released . . . ."

These provisions, on their face and as interpreted by the Court of Appeals, have an extraordinarily severe impact upon a person acquitted by reason of insanity. In the first place, he is mandatorily committed to a mental institution without any finding that he is at the time mentally ill. Indeed, he is committed without even a finding that he has at any time been mentally ill, since acquittal because of insanity means no more than that there is a reasonable doubt that the act charged to be a crime was the product of mental illness or disease. *Davis* v. *United*

country. We will, in the course of our discussion of the constitutionality of the statute, advert to comparable statutes of the States. At this point, however, it may be useful to note that a defendant acquitted on grounds of insanity in the District Court of the District of Columbia receives radically different treatment than he would in any other federal court. In fact, the lower federal courts are in disagreement as to whether there is any authority at all outside the District of Columbia to commit such a person to a mental hospital. *Compare Sauer* v. *United States*, 241 F. 2d 640, 650-652 and note 32 (9th Cir. 1957), *cert. denied*, 354 U.S. 940, *with Pollard* v. *United States*, 282 F. 2d 450, 464, 285 F. 2d 81 (6th Cir. 1960). See also *United States* v. *Currens*, 290 F. 2d 751, 775-776 (3d Cir. 1961), and *Howard* v. *United States*, 229 F. 2d 602, 608 (5th Cir. 1956) (dissenting opinion), *rev'd on rehearing en banc*, 232 F. 2d 274. At any rate, even if, as the *Pollard* court held, there is such authority, the careful and detailed second opinion in that case demonstrates that (1) the authority is a discretionary one; (2) commitment is to be based upon a finding of present insanity; and (3) release is to be based upon a finding of recovery of sanity or sufficient recovery so that no danger would result. This is obviously far removed from the procedures in effect in the District of Columbia.

II. Petitioner is Entitled to His Release Because the Statutory Provisions Under Which He is Being Detained, as Construed by the Court of Appeals, Are Invalid on Their Face.

Since civil commitment proceedings have never been instituted against petitioner, the sole warrant for his confinement is sections 301(d) and 301(e). It is our view that these provisions, as construed by the Court of Appeals,

are invalid both on their face and as applied under the Due Process Clause of the Fifth Amendment, and that consequently, petitioner is entitled to be discharged.

Before we explain the basis for our position, however, we think it advisable to disclaim any intention to press these constitutional issues upon the Court as the preferable ground for decision. On the contrary, we believe that the Court's well established principle of judicial restraint dictates that the case be disposed of on the much narrower non-constitutional grounds discussed in the later portion of this brief, namely, that whatever may be said about the commitment procedures in the normal case, they cannot be foisted upon a defendant who wishes to plead guilty to a misdemeanor, or alternatively that these procedures should be construed to be inapplicable where the crime charged is not one of violence. And in this instance we regard such a course of action as especially appropriate, in view of the extraordinarily complicated nature of the constitutional issues and the probable impact of their resolution upon the Durham Rule. We are confident that the Court would wish to avoid, if possible, a constitutional decision that would freeze in any fashion the actions of the lower courts and Congress in the conduct of the Durham experiment.

If, however, the Court should reject our position on the non-constitutional issues, it would then be compelled to decide the constitutional questions. Consequently, we are obliged to analyze them. Moreover, since the non-constitutional issues cannot be appreciated fully except in the context of the constitutional questions, we believe it desirable to address ourselves first to these broader problems.

A. *Section 301(d), as construed by the Court of Appeals, is unconstitutional on its face because it applies to every case where there is an acquittal on grounds of insanity, no matter how trivial the offense charged, and under these circumstances it provides insufficient safeguards to assure that commitment is justified.*

Under section 301(d), commitment is automatic in every case in which there is an acquittal on grounds of insanity.[14] As the case at bar demonstrates, the Court of Appeals has read the provision literally, so that it applies in misdemeanor cases as well as in felonies, and in cases where the crime charged is non-violent as well as where it is one of violence. Thus the maniacal killer is treated the same as the obsessive-compulsive overtime parker. Moreover, commitment is not grounded upon any finding whatsoever as to present insanity. The only factual basis for commitment that is required under the statutory scheme is the reasonable doubt of the trier of fact as to the individual's mental health as of a prior date, *i.e.*, as of the time he committed the act charged to be criminal. That date, of course, may have been years in the past, and in fact a substantial time lag is the rule rather than the exception because normally the defendant will have been hospitalized prior to trial pursuant to section 301(a) for examination as to competency to be tried.[15] Moreover, between the date

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[14] For purposes of this part of our argument, we put aside the problems involved where the accused wishes to plead guilty. As we demonstrate later, under such circumstances the unconstitutional characteristics of the procedure are aggravated.

[15] For example, in *Durham* the trial took place approximately 19 months after the offense, see 214 F.2d 862, 864; in *Fielding* v. *United States*, 251 F.2d 878, 879 (D.C. Cir. 1957), the delay was two years and nine months; in *Douglas* v. *United States*, 239 F.2d 52, 54 (D.C. Cir. 1956), two years elapsed between offense and trial; and in *Askins* v. *United States*, 231 F.2d 741 (D.C. Cir. 1956), where, although the in-

of the alleged offense and the date of commitment there is a finding as to mental competency to stand trial. Such a finding is, of course, not necessarily incompatible with the existence of mental illness, since under section 301(a) a person is competent to be tried as long as he is able to "understand the proceedings against him . . . [and] properly to assist in his own defense." See, *e.g.*, *Durham* v. *United States*, 237 F. 2d 760, 761 (D.C. Cir. 1956); *Williams* v. *Overholser*, 162 F. Supp. 514 (D.D.C. 1958). Nonetheless, the existence of a finding of such a degree of competency underscores the necessity for a further finding as to mental illness prior to commitment.

We believe that this combination of circumstances renders the statute as construed unconstitutional on its face. The principal difficulty it that there is a lack of procedural safe-

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sanity defense did not prevail, one member of the Court of Appeals believed that it should have as a matter of law, *17 years* intervened between the crime and the trial.

The possible consequence of a perfectly sane and harmless person being committed under provisions like section 301(d) is obvious. See the following statements in letters on file with the Northwestern Law Review (see note 20, *infra*):

> "We have, on several occasions, seen individuals who committed crimes while obviously insane, were subsequently treated and cured, then stood trial, and were declared not guilty by reason of insanity." Letter from J. Berkeley Gordon, M.D., Medical Director, New Jersey State Hospital, Sept. 7, 1961.
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> "Since the mental condition *at the time of the crime*, can change for better or for worse or remain static, *by the time of the trial*, this cannot be used as an accurate diagnosis *of the present* mental condition." Letter from Rev. Vincent Tikuisis, Psychologist, Illinois Security Hospital, Sept. 6, 1961.
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> "I have been involved in several cases where the trial and the finding of not guilty by reason of insanity took place years after the crime. In many of these cases, the mental condition of the patient at trial was, for all practical purposes, 'recovered from mental illness'. . . . [The] mandatory return to the state hospital very often has little to do with the mental condition of the accused several years before." Letter from William J. T. Cody, M.D., Medical Administrator, Hawaii State Hospital, Sept. 6, 1961.

guards adequate to establish a sufficient probability that the person is a fit subject for commitment. Since the Court of Appeals has firmly—and in our view properly—rejected the notion that the commitment partakes in any way of punishment, see, *e.g.*, *Hough* v. *United States*, 271 F. 2d 458, 462 (1959),[18] the only basis for commitment appears to be the presumption that, because the person was acquitted on grounds of insanity, his mental condition is such that commitment is warranted. In view of the factors outlined above, we believe that such a presumption violates due process because there is no "rational connection between the fact proved [a reasonable doubt as to sanity at some prior time] and the ultimate fact presumed [mental illness at the time of commitment sufficient to warrant such action]." *Tot* v. *United States*, 319 U.S. 463, 467 (1943). The inference "is so strained as not to have a reasonable relation to the circumstances of life as we know them." *Id.*, at 468. The validity of this conclusion is demonstrated by the fact that the statute makes the presumption

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[18] As Judge Bazelon, the author of *Durham* and one of the country's foremost authorities on this subject, put it in *Hough*:

> ". . . Nothing in the history of the statute—and nothing it its language—indicates that an individual committed to a mental hospital after acquittal of a crime by reason of insanity is other than a patient. The individual is confined in the hospital for the purpose of treatment, not punishment; and the length of confinement is governed solely by considerations of his condition and the public safety. Any preoccupation by the District Court with the need of punishment for crime is out of place in dealing with an individual who has been acquitted of the crime charged."

See also the majority opinion in the case at bar and Judge Burger's opinion for the majority in *Overholser* v. *O'Beirne*, — F.2d — (Oct. 19, 1961).

This view is, of course, the general one regarding persons acquitted on grounds of insanity. See, *e.g.*, *Davis* v. *United States*, 160 U.S. 469, 485 (1895); *Hopps* v. *People*, 31 Ill. 385 (1863); *People* v. *Garbutt*, 17 Mich. 9 (1868); *State* v. *Bartlett*, 43 N.H. 224, 230 (1861); *Trial of Edward Arnold*, 16 How. State Tr. 695, 764-765 (1723).

conclusive, for the mandatory terms of section 301(d) preclude any hearing in which the individual would have a chance to rebut the presumption.[17] Were the trial judge required to make a finding as to present mental condition and were the individual given an opportunity to contest the commitment, it might be proper to use a presumption of continued mental disease to shift the burden of proof to him. But that is not this case.[18]

Of course, the content of the term "rational connection" depends to a large extent upon the character of the action taken on the basis of the presumption. For example, no doubt a reasonable question as to sanity at some prior time would warrant the Government in conducting a further investigation as to present mental stability before entrusting a person with a highly important job. However, we are confident that it is unnecessary for us to belabor the fact that forced confinement in an insane asylum is a deprivation of quite a different order, and consequently we

[17] This, of course, is not the situation in ordinary civil cases. See *Fugate* v. *Walker*, 204 Ky. 767, 773, 265 S.W. 331, 333 (1924) (a prior finding of insanity "is only prima facie evidence of that condition existing at [a future time]"); *Eagle* v. *Peterson*, 136 Ark. 72, 206 S.W. 55 (1918).

[18] It is interesting that the Committee on Mental Disorder, whose report formed the basis for the 1955 legislation and constituted the principal text of the Senate and House Committee reports, seems to have assumed erroneously that there would be a stronger basis for a continued presumption than in fact there is. The Committee stated:

> "Where the accused has pleaded insanity as a defense to a crime, *and the jury has found that the defendant was, in fact, insane at the time the crime was committed,* it is just and reasonable . . . that the insanity, *once established,* should be presumed to continue and that the accused should automatically be confined for treatment until it can be shown that he has recovered." H.Rep. No. 892, 84th Cong., 1st Sess., p. 13. (Emphasis supplied.)

As acquittal on grounds of insanity does not—as the Committee must have known—even approximate such a finding. Instead, as we have indicated, it represents only a failure on the part of the prosecution to overcome "some" evidence of insanity and in consequence its failure to prove sanity beyond a reasonable doubt.

submit that in this context the mandatory commitment provision, which forecloses any inquiry into whether the person being committed is in fact wholly sane, is invalid. See *In re William M. Bryant*, 14 D.C. (3 Mackey) 489 (1885); *Barry* v. *Hall*, 98 F. 2d 222, 225 (D.C. Cir. 1938) ("[C]onfinement in a mental hospital is as full and effective a deprivation of personal liberty as is confinement in jail. . . . Due process of law . . . [necessitates] an opportunity for a hearing and a defense"). In fact, we are doubtful that the "rational basis" formula, which has generally been employed only in cases involving property rights, is appropriate where personal liberty is involved. Rather, we are inclined to believe that the test should be phrased in terms akin to the standards that have been established in First Amendment cases, such as "clear and present danger" or "the gravity of the evil discounted by its improbability." See, *e.g.*, *Schenck* v. *United States*, 249 U.S. 47, 52 (1919); *Dennis* v. *United States*, 241 U.S. 494, 510 (1951). However, while we recognize that there is a difference of opinion in the Court as to the proper tests to be applied in such cases, we regard it as unnecessary to explore the matter, since even the so-called "balance of interests" criterion leads to the same result in this instance, as we believe we have demonstrated.

The problem may also be considered in terms of equal protection, in view of the elaborate procedural safeguards surrounding a civil commitment and the fact that the Government in such a proceeding has the burden of proving present insanity. See D.C. Code 21-306 *et seq.*[19] There is not a sufficient basis, in our view, to distinguish for commitment purposes the ordinary citizen from the person who has

[19] In our view, notice and opportunity to be heard could not constitutionally be dispensed with in civil commitment proceedings. See *Barry* v. *Hall*, *supra*; *In re Lambert*, 134 Cal. 626, 66 Pac. 851 (1901) (holding statute invalid); *State* v. *Billings*, 55 Minn. 467, 57 N.W. 794

been acquitted of a crime on grounds of insanity, especially where the crime was a non-violent misdemeanor. To put the matter concretely, what would be the response of the judiciary to a statute establishing a new civil commitment procedure under which, upon complaint, a person could be subjected to a hearing before a mental health commission, which could commit him to a mental institution upon the basis of a reasonable doubt that, when he unjustifiably refused to pay bills or dumped garbage in the street to spite his neighbor two years before, he was suffering from a mental illness, especially when the most recent medical evaluation was that he was competent to participate in the hearing? But if such a procedure would be regarded as unconstitutional—as surely it would—how can the commitment of an individual adjudged not guilty of a non-violent misdemeanor on grounds of insanity be distinguished as long as that commitment is not designed to be punishment? We submit that there is no satisfactory answer for such a distinction and that the evident discrimination renders the existing procedures invalid. We recognize, of course, that the Equal Protection Clause of the Fourteenth Amendment is not directly applicable to the District of Columbia, but we believe this Court has made it plain that the principle of equal protection is given effect through the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

(1894) (same); *People ex rel. Sullivan* v. *Wendel*, 33 Misc. 496, 68 N.Y. Supp. 948 (Sup. Ct. 1900); *State ex rel. Fuller* v. *Mullinax*, 364 Mo. 858, 269 S.W. 2d 72 (1954) (same). See also the following statement by the American Bar Association Special Committee on the Rights of the Mentally Ill:

> "Any person, before he is committed to a mental hospital or otherwise deprived of his liberty, should be served with notice and given a full opportunity to be heard. On this we, the Committee, insist as a constitutional requirement." 72 A.B.A. Rep. 295 (1947).

We believe that our conclusions are correct despite the fact that the section 301(d) commitment may be temporary, either because examination in the mental hospital may satisfy the physicians that confinement is not warranted or because the individual may succeed in establishing his right to release through a habeas corpus proceeding. The Court of Appeals, in upholding the validity of section 301(d), emphasized that the commitment was not necessarily permanent, *Ragsdale* v. *Overholser*, 281 F. 2d 943 (1960); but, with all deference to a distinguished court, this appears to us to mean nothing more than that the unconstitutional deprivation of liberty is not as severe as it might be. Several considerations are relevant in this connection. In the first place, it is obvious that the confinement will always be for a substantial period of time, since a psychiatric examination cannot be made overnight. In the second place, as we have already indicated and as we discuss in more detail in the next section of our brief, the standards for securing release are extremely onerous, and in consequence the initial commitment is all-important. And so far as the availability of habeas corpus is concerned, this burden is even heavier as a practical matter, because habeas corpus is not sought unless the government psychiatrists are unwilling to make the necessary representations, and the consequence is that in order to have any chance of success the patient must incur the considerable expense—probably prohibitive for most—of engaging the services of a private psychiatrist. Finally, we repeat that what is involved here is forced confinement, whether for weeks, months or years, in an insane asylum, and surely the attitudes of our society have not yet become so sophisticated that this may be viewed as the equivalent of a vaccination program.

In taking the position that we do, we do not wish to minimize in any way the substantial interest that society has

in protecting itself, nor do we believe, as we have indicated, that the Durham Rule should be applied without procedures adequate to safeguard this interest. All that we urge is that the procedures here involved go too far, for commitment occurs without any finding or hearing as to present mental condition or dangerousness and solely upon the basis of a reasonable doubt as to mental illness or disease when the criminal act was committed, whether that act was murder or overtime parking. And it is worth noting that the section 301(d) procedure is obviously not the only method available. For example, the statute could at least require a hearing and a finding by the trial judge immediately after acquittal as to the defendant's then mental condition and dangerousness. Such a procedure is employed in a number of states.[20] Compare the pre-trial procedure under the federal statute upheld in *Greenwood* v. *United States*, 350 U.S. 366 (1956). Nor would further examination necessarily be required at that time, since the trial judge would have available the trial testimony as well as the psychiatric re-

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[20] The statutory situation in the states may be summarized as follows: Ten states and the Virgin Islands have mandatory commitment laws. See Colo. Rev. Stat. Ann. 39-8-4 (Supp. 1960); Ga. Code Ann. 27-1503 (1953); Kan. Gen. Stat. Ann. 62-1532 (1949); Mass. Ann. Laws, ch. 123, § 101 (1957); Mich. Stat. Ann. 28.933(3) (1954); Minn. Stat. Ann. 631.19 (as amended, Laws 1957, ch. 196, § 1); Neb. Rev. Stat. 29.2203 (1943); Nev. Rev. Stat. 175.445 (1955); N.Y. Sess. Laws, 1960, ch. 550, §§ 1-3; Ohio Rev. Code 2945.39 (Baldwin 1953); Wis. Stat. Ann. 957.11 (1958); V.I. Code Ann. 5-3637 (1957). These laws are not uniform in their terms. In Massachusetts, for example, commitment is automatic only where the crime charged was murder or manslaughter; otherwise, commitment is discretionary. Mass. Ann. Laws, ch. 277, § 16, ch. 278, § 13. And the Michigan statute applies only in murder cases.

The laws in effect in the other states are summarized as follows in Comment, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration*, 68 Yale L.J. 293, 306 (1958): (1) "Eight states grant the court discretionary commitment authority but neither establish statutory criteria nor require post-trial inquiries." (2) "In twelve jurisdictions the court may order commitment if it deems the acquitted defendant dangerous to public peace or safety." (3) "Eight states permit commitment after trial if the court

port made in connection with the inquiry into the defendant's competency to stand trial. And even the existing section 301(d) procedure might pose somewhat less serious problems if restricted to persons committing felonies of violence, since in such cases society's interest in security is more substantial than in a case like this one. In short,

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determines that the defendant's mental disorder persists." (4) "In seven states, the jury determines the defendant's present mental condition in addition to his condition at the time of the alleged crime." (5) "A second jury trial to determine present mental condition is required in three states." (6) "California requires commitment unless the court believes the defendant to be fully recovered. A new sanity determination must then be made." (7) "Wyoming provides for the immediate initiation of mandatory civil commitment proceedings." (8) Tennessee has no commitment provision. The Comment also provides the citations to all of these statutes, and a more detailed summary of their provisions may be found in The Mentally Disabled and the Law (ed. Lindman and McIntyre, 1961), p. 373 *et seq.*

Of course, any comparison of these statutes with the District of Columbia provisions, to be entirely accurate, would have to be based upon an exhaustive study of the pertinent release provisions, the standard of proof necessary to secure an acquittal, and the state case law bearing on commitment and release. For example, in some of the mandatory commitment states, the raising of a reasonable doubt as to sanity is not sufficient to obtain an acquittal. See *Blackston* v. *State*, 209 Ga. 160, 71 S.E. 2d 221 (1952) (defendant must prove insanity by preponderance of the evidence); *Carroll* v. *State*, 204 Ga. 510, 50 S.E. 2d 330 (1948) (same); *State* v. *Finn*, 257 Minn. 138, 100 N.W. 2d 508 (1960); Minn. Stat. Ann. 610.10 (same); *State* v. *Clancy*, 38 Nev. 181, 147 Pac. 449 (1915) (same); *State* v. *Colley*, 78 Ohio App. 425, 65 N.E. 2d 159 (1946) (same). And we have not discovered any jurisdiction that applies the stringent tests for release that are used in the District of Columbia. In Kansas, for example, where the mandatory commitment law has been upheld, *Ex parte Clark*, 86 Kan. 539, 121 Pac. 492 (1912), the Department of Social Welfare may make the release determination or may delegate this function to the superintendent of the hospital, and the standard is that the person committed after acquittal "may be granted convalescent leave or discharged as any other committed patient." Kan. Gen. Stat. Ann. 62-1532 (1949). And it should also be noted that in Michigan, the only other state with a mandatory commitment provision that has been approved by the state courts, see *People* v. *Dubina*, 304 Mich. 363, 8 N.W. 2d 99 (1943), *cert. denied*, 319 U.S. 766, a special verdict is not required so that it can be determined whether the acquittal was on grounds of insanity. Consequently, as a practical matter the commitment is discretionary, for the judge may or may not request a special verdict, and if there is no such verdict

the position we adopt does not mean that the courts and the Congress would be faced with the choice of either abandoning *Durham* or jeopardizing the security of society. Moreover, it should be pointed out that the existence of these alternatives is itself relevant to the constitutional issue. See, *e.g.*, *Shelton* v. *Tucker*, 364 U.S. 479, 488-489 (1960), and cases there cited.

In any event, the Court of Appeals' opinion in *Ragsdale* does lead directly to the next set of problems, for if the initial commitment is to be justified in part on the basis of its temporariness, it is plain that everything turns upon what follows.

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there is no basis upon which the commitment statute can become operative. It is for this reason that the author of a soon to be published article on this general subject has concluded that the *Dubina* decision "actually upheld *discretionary* commitment and is *not* good authority for compulsory commitment." Kimbrell, *Compulsory Commitment Following a Successful Insanity Defense*, manuscript, p. 8 n. 66, to be published in 56 Nw. U.L. Rev., No. 3 (July-August, 1961). Prior to *Dubina*, *Underwood* v. *People*, 32 Mich. 1 (1875), had held a mandatory commitment provision invalid, and a minority of courts have held even discretionary commitment procedures invalid. See *In re Boyett*, 136 N.C. 415, 48 S.E. 789 (1904); *Brown* v. *Urquhart*, 139 Fed. 846 (C.C. W.D. Wash. 1905). See also *Yankulov* v. *Bushong*, 80 Ohio App. 497, 502, 77 N.E. 2d 88, 91-92 (1945), where the court in dicta cast doubt upon the validity of the Ohio mandatory commitment statute in the following passage:

> "However, where the constitutional question of due process of law has been raised, it has been seriously questioned whether a commitment for insanity can properly be sustained in the absence of any provision for a finding as to the continuance of the insanity at the time of the trial."

But see Gleason v. *West Boylston*, 136 Mass. 489 (1884); and *compare Bailey* v. *State*, 210 Ga. 52, 55, 77 S.E. 2d 511, 514 (1953) *with Long* v. *State*, 38 Ga. 491, 507 (1868).

We wish at this point to note our indebtedness to Mr. Kimbrell, the Editor-in-Chief of the Northwestern University Law Review, for sending us the manuscript of his article in advance of printing. He informs us that the issue in which it is to appear will be mailed to subscribers on or before December 1, and consequently we are hopeful that the Court will be able to make use of what in our judgment is a perceptive and exhaustive study of some of the issues directly involved in this case.

B. *Section 301(e), as construed by the Court of Appeals, is unconstitutional because of the onerous burden of proof it imposes upon the person seeking release.*

The first question arising under section 301(e) may be stated as follows: What constitutional basis is there for confining a person in a mental institution until he can establish, beyond a reasonable doubt, that his mental condition is no longer such as to warrant confinement, especially when the basis for confinement is nothing other than a reasonable doubt that, at some time in the past, he was afflicted with mental disease or illness, and when he has since that time been certified as competent to participate in legal proceedings? And it is worth noting that in habeas corpus proceedings, it seems that the burden is even heavier —if that is possible—for the applicant must then prove that the hospital authorities acted arbitrarily or capriciously in refusing to certify him as "recovered" and to predict that he "will not in the reasonable future be dangerous to himself or to others." See *Overholser* v. *Leach*, 257 F.2d 667, 669 (1958), *cert. denied*, 359 U.S. 1013. In view of the "no reasonable doubt" standard for release, *Ragsdale* v. *Overholser*, 281 F.2d 943, 947 (1960), probably a showing of arbitrariness could not be made if the hospital authorities testified merely that they had such a reasonable doubt, no matter what type of evidence the applicant introduced.

Again, the problem may be considered not only in ordinary due process terms but also in terms of the principle of equal protection as reflected in the Due Process Clause of the Fifth Amendment, in view of the existing civil commitment procedures. See D.C. Code, 21-306 *et seq.* And again, for purposes of illustration, consider the man who is brought before a civilly constituted mental health commission, is found to have refused unjustifiably to pay his bills or maliciously to have dumped his garbage on his neighbor's lawn

two years previously, is adjudged not to have been sane beyond a reasonable doubt at that time though competent to participate in the commitment proceeding, is committed to a mental institution for examination, and who, at the end of the examination, is able to adduce proof "only" that the examining psychiatrist cannot say beyond a reasonable doubt that he is sane. While such a person may receive due process in the sense of notice and hearing, it is established that burden of proof may also be an element of due process, *Speiser* v. *Randall*, 357 U.S. 513 (1958); *cf. Smith* v. *California*, 361 U.S. 147 (1959); and we cannot believe that the Solicitor General would even suggest to this Court that such a statute would be constitutional. But if it would not, how can it be argued that section 301(e) is constitutional, for the procedure under it differs only in that the subject is a person who has been acquitted of a criminal charge on grounds of insanity, that criminal charge may be petit larceny, and it is conceded that his commitment should not in any way partake of punishment.

C. *Section 301(e), as construed by the Court of Appeals, is unconstitutional because it requires a showing of freedom from "mental abnormality."*

The invalidity of section 301(e) becomes even clearer when consideration is given to what it is that the individual must prove beyond a reasonable doubt. The question may be put as follows: What is the constitutional justification, once the person who is confined has established beyond a reasonable doubt that he is sane, for continuing his confinement until he can prove beyond a reasonable doubt also that he is free "from such abnormal mental condition as would make [him] . . . dangerous to himself or the community in the reasonably foreseeable future"? *Overholser* v. *Leach*, *supra*.

The significance of this question may be more fully appreciated if it is noted that the court in Leach held that the individual there involved could not be released, not because he had failed to establish sanity or absence of mental disease or illness, but because he had not disproved evidence that he was "a sociopathic personality with dyssocial outlook" who would be dangerous if released. The term sociopathic personality is used by different persons to signify different things, and, perhaps partly because of this, there has been a dispute among psychiatrists as to whether the term describes a true mental disease.[21] The important consideration for present purposes, however, is that it is plain that the *Leach* court did not regard this dispute as important, but rather believed that, even if Leach's mental condition was not serious enough to warrant classifying him either as insane or as suffering from a mental disease, he could not be released because of his "abnor-

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[21] According to English and English's Comprehensive Dictionary of Psychological and Psychoanalytical Terms, "sociopathic personality" means, among other things, "a broad category for disorders in one's relationship with society and with the cultural milieu. It includes antisocial and dyssocial reactions, sexual deviations, and sexual anomalies." "Sociopathy" is referred to as "a vague term covering any kind or complex of abnormal attitudes towards social environment." And according to Webster's Unabridged New International Dictionary (2d ed.), "dyssocial" means "unfriendly to society," "unsocial," or "selfish."

In 1952, the American Psychiatric Association altered its accepted nomenclature so as to remove the sociopathic personality and psychopathic personality disturbance from the non-disease category. Diagnostic and Statistical Manual, Mental Disorders (Mental Hospital Service), p. 38. In 1957, the St. Elizabeth authorities followed suit. See *In re Rosenfield*, 157 F. Supp. 18, 21 (D.D.C. 1957); *Overholser* v. *O'Beirne*, —— F.2d —— (Oct. 19, 1961), slip op., p. 8 n. 9; Halleck, *op. cit. supra* note 2, at 311, 311 n. 94.

The psychiatrists who testified in the *Leach* and the *O'Beirne* cases agreed as to diagnosis, but disagreed as to whether the individuals could be said to have a "mental disease."

mal mental condition."[22] The consequence is that a person who is not insane or even afflicted with mental disease or illness, but who cannot establish beyond a reasonable doubt that his personality is not so "abnormal" that he might commit some sort of crime if released, can be held in custody for the rest of his life. Nor is this a chimerical fear, since continuation of confinement does not depend upon any showing that the "abnormal mental condition" may improve, *Ragsdale* v. *Overholser*, 281 F.2d 943 (D.C.

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[22] The first opinion in the *Leach* case used the words "mental disease or defect" as establishing the standard (unreported opinion entered July 10, 1958), but the terminology "abnormal mental condition" was substituted in the amended opinion. Thus "[t]he phrase . . . was obviously chosen with meticulous care, and was manifestly designed to reach the case of a sociopath acquitted on grounds of insanity who, though 'sane' and not mentally diseased in the terminology of some specialists, may suffer from an emotional disorder which makes him dangerous. Indeed, 'abnormal mental condition' is a sufficiently comprehensive standard to reach all types of mental disorders. Thus, in [*Overholser* v. *Russell*, 283 F.2d 195 (1960)] . . . release was denied to a person diagnosed as suffering from a 'psychoneurotic reaction, obsessive compulsive reaction.' In the opinion of one psychiatrist, the patient would have been 'dangerous to society because of his checkwriting proclivity' were he released." Krash, *op. cit. supra*, p. 944. And see the testimony of a medical witness in the case of *Curry* v. *Overholser*, 287 F.2d 137 (D.C. Cir. 1960), that "abnormal mental condition" means "any condition of behavior of thinking which incapacitates an individual from making an acceptable adjustment in the com unity." (Joint App., p. 51)

Krash's judgment is confirmed, not only by *Russell* and the case at bar, but also by the recent decision in *Overholser* v. *O'Beirne*, ——F.2d —— (Oct. 19, 1961), where the court, Judge Edgerton dissenting, reversed a judgment ordering the release of a person who had been acquitted of petit larceny charges on grounds of insanity four years before. The medical witnesses agreed that O'Beirne suffered from a "sociopathic personality disturbance, antisocial reaction," but disagreed as to whether this amounted to a mental disease. Judge Burger, for the majority, stated, "The issue is not whether O'Beirne now has a 'mental disease' but whether he has an 'abnormal mental condition' which will cause him to be dangerous. . . . Judge Washington's choice of words 'abnormal mental condition' in *Leach* was not casual or thoughtless, but studied and calculated." Slip op., pp. 13, 14.

Cir. 1960), and it is well recognized that it is extremely difficult to treat sociopaths.[23]

The implications of this confinement procedure in terms of our traditional concept that confinement, at least of the sane, depends upon criminal guilt are obvious, and some members of the Court of Appeals have expressed their serious concern. As Judge Fahy has put it:

> "It is by no means clear that society can continue to deprive a person of liberty by attributing to a jury's doubt about his mental condition, which led to his acquittal and mandatory commitment, any and all evil or criminal propensities he may be thought to have, and to keep him in confinement because of them. This would transform the hospital into a penitentiary where one could be held indefinitely for no convicted offense, and this even though the offense of which he was previously acquitted because of doubt as to his sanity might not have been of the more serious felonies." *Ragsdale* v. *Overholser, supra,* at 950 (concurring opinion).

Commentators have agreed.

> "But on what theory can a 'sane' person be detained in a mental institution, even assuming that he suffers

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[23] "The possible extension of *Durham* to psychopaths [now an accomplished fact] may create exceptional hardships. Generally considered as personality and character disorders, psychopathic abnormalities are deep-seated and substantially less amenable to treatment than psychotic reactions. Weihofen, Mental Disorder as a Criminal Defense 27 (1954)." Comment, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration,* 68 Yale L.J. 293, 303 n. 44 (1959).

See also White, The Abnormal Personality (2d ed. 1956), p. 398; Cleckley, The Mask of Sanity (1955), *passim*; medical testimony in *O'Beirne* ("[T]here is almost no cure for a sociopathic personality." Slip op., p. 9); and medical testimony in *Ragsdale.*

> from an 'abnormal mental condition' and that he would be dangerous if released? . . . [T]o detain a 'sane' person in a mental institution is plainly punitive. In addition, the argument that such persons can be confined to protect the public because they may be potentially dangerous will not withstand the slightest scrutiny. To deprive a person of liberty because of 'evil or criminal propensities he may be thought to have' would offend due process; it 'would transform the hospital into a penitentiary where one could be held indefinitely for no convicted offense.'" Krash, *op. cit. supra*, p. 945.
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> "[A] decision not to release solely on the basis of *potential* dangerousness would be like a decision not to discharge a tubercular patient—though no longer infectious—because he is a potential killer or check-forger." Goldstein & Katz, *Dangerousness and Mental Illness; Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 Yale L.J. 225, 238 (1960).[24]

In short, the procedure sanctioned by the Court of Appeals pursuant to section 301(e) amounts to a type of protective custody that, so far as we know, is unprecedented, that could not be applied even to a convicted felon after he serves his sentence, that plainly could not be utilized in regular civil commitment proceedings, and that consequently represents a denial of due process.

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[24] See also Kimbrell, *op. cit. supra* note 20, at 17-18 ("These procedures [the District of Columbia release procedures] place an almost insuperable burden on the patient who attempts to obtain release via habeas corpus.").

III. Petitioner is Entitled to His Release Because the Statutory Provisions Under Which He is Being Detained are Invalid as Applied to Him.

For the reasons set forth above, we believe that the statutory provisions by virtue of which petitioner is being confined, as construed by the Court of Appeals, are constitutionally invalid on their face, and that consequently he is entitled to his release. Moreover, the invalidity of these provisions is, if anything, even plainer when they are considered as they apply to petitioner. And, if constitutional issues are to be reached, we respectfully suggest that the case could most appropriately be disposed of on these relatively narrow grounds. Basically, the factors that heavily underscore the invalidity of petitioner's confinement are two: his objection to the raising of the insanity question and the nature of the crime with which he was charged.

A. *The invalidity of petitioner's confinement is accentuated by the fact that the insanity issue was raised at his trial over his objection.*

In the ordinary case arising under sections 301(d) and 301(e), the person has sought an acquittal on grounds of insanity, and hence it might be argued that he has voluntarily accepted the consequences, including the commitment and confinement procedures of the statute. The state has no obligation to permit a defendant to escape conviction on grounds of insanity, the argument would run—or in any event on grounds of mental disease or illness under the modified *Durham* test—and consequently the state is entitled to exact a sort of *quid pro quo* for its generosity.[25]

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[25] This approach is implicit in *Ragsdale* v. *Overholser*, *supra*, at 949, where the court said:

"It is hardly asking too much to require that a defendant who is ab-

The defendant knows that if his defense succeeds he may spend a lifetime in St. Elizabeths, and his deliberate choice to run this risk amounts to "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

This, we believe, is too facile an approach. In the first place, certainly it is far from clear that the state is free to withhold an insanity defense where the crimes charged have traditionally included specific intent as a necessary element and where the penalties are severe. See *Smith* v. *California*, 361 U.S. 147, 150 (1959); *cf. Leland* v. *Oregon*, 343 U.S. 790 (1952).[26] And in the second place, the pressures upon a person charged with crime to claim whatever defense can reasonably be made are so great that the voluntariness of his "waiver" is subject to grave doubt.[27]

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solved from punishment by society because of his mental condition . . . should accept some restraint on his liberty. . . ."

See also *Curry* v. *Overholser*, 287 F.2d 137, 139-140 (D.C. Cir. 1960); *People ex rel. Peabody* v. *Chanler*, 133 App. Div. 159, 162, 117 N.Y. Supp. 322, 324 (1909); *Commonwealth ex rel. Bickel* v. *Bennett*, 15 Wkly. Notes Cas. 515, 517, 18 Phila. 432, 438 (1885) ("The prisoner appealed to this defense, and it served her purpose at the time. She must take the burden with the benefit."); *Commonwealth* v. *Baginski*, 85 Pa. Super. 47, 49 (1925); *Bonfanti* v. *State*, 2 Minn. 99, 109 (1858).

[26] See also *State* v. *Strasburg*, 60 Wash. 106, 110 Pac. 1020 (1910) (statute abrogating insanity defense unconstitutional); *Sinclair* v. *State*, 132 So. 581, 584 (Miss. 1931) (same); *State* v. *Lange*, 168 La. 967, 123 So. 642 (1929); Smoot, The Law of Insanity, p. 373 (1929) ("So clearly has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English-speaking countries, that it has become a part of the fundamental laws thereof, to the extent that a statute which attempts to deprive a defendant of the right to plead it will be unconstitutional and void.").

[27] Goldstein and Katz seem to be of the view that this theory might validate the original commitment, but not the continued confinement. They state:

"In effect, the defendant, by raising the defense of insanity . . . postpones a determination of his present mental health and acknowledges the right of the state, upon accepting his plea, to detain him for diagnosis, care, and custody in a mental institution until certain specified conditions are met.

"The court might, though it is doubtful, affirm the constitutionality [of

At any rate, the point is that the waiver theory is not available to the government in this case, for petitioner deliberately chose not to raise the insanity issue (and for what turns out to have been excellent reason). Commitment and confinement were thrust upon him against his wishes, and the consequence is that the invalidity of his confinement is accentuated.

B. *The invalidity of petitioner's confinement is also accentuated by the fact that the crime with which he was charged was a misdemeanor and did not involve violence.*

The crime of which petitioner was acquitted was not only a misdemeanor, but also a misdemeanor that involved no violence. The application of sections 301(c) and 301(d) is arguably somewhat more justifiable where the defendant has committed a felony of violence, since then the stake of society is in preventing further injury to person rather than in protecting property rights. The confinement of petitioner, however, lays the basis for the confinement of persons in St. Elizabeths for life solely on the basis of the most petty of offenses. If petitioner's commitment and confinement are constitutional, how distinguish the case of an overtime parker who, according to psychiatrists, may have been driven to his offense by an obsessive-compulsive neurosis? Decisions other than this one confirm our conviction that our fear is anything but fanciful. See *Overholser* v. *Russell*, 283 F.2d 195 (D.C.Cir. 1960), where release was denied a person whose hospital diagnosis was "psychoneurotic reaction, obsessive compulsive reaction," a neurosis that apparently produced the crime with which he had been

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the release provision regarding dangerousness] . . . on the theory that the defendant 'voluntarily' accepted these conditions for release by electing the defense of insanity. Realistically, this would stretch voluntariness to an absurd, though technically logical, point." *Op. cit. supra*, pp. 230, 238.

charged, *i.e.*, writing a bad check. And see the various opinions in *Williams* v. *Overholser*, 259 F.2d 175, 162 F.Supp. 514, 165 F.Supp. 879, 147 A.2d 773, all involving an attempt by the government to use a charge of public drunkenness as the basis for securing a commitment and confinement under sections 301(d) and 301(e), despite the repeated efforts of appellate courts to induce the institution of civil commitment proceedings.[28]

IV. Non-Constitutional Grounds for Reversing the Judgment Below

The factors which highlight the unconstitutionality of the statute as it is applied to petitioner also suggest the alternative bases for reversal that, as we have indicated, constitute in our view the most appropriate grounds for disposing of this case. These alternative grounds are two: First, the trial judge erred in refusing to accept petitioner's guilty plea, and second, sections 301(d) and 301(e) should not be construed to apply to petitioner.

A. *The trial judge erred in refusing to accept petitioner's guilty plea.*

1. The provision governing entry of guilty pleas binds the court to accept such pleas if made voluntarily and with knowledge of the consequences.

The provision governing the acceptance of guilty pleas in the Municipal Court is Rule 9 of the Municipal Court

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[28] The Court of Appeals majority has recognized, and declared the validity of, the consequences of their position. See *Ragsdale* v. *Overholser*, *supra*, at 947 ("It is quite possible, as appellant argues, that a person acquitted and then committed under § 24-301 on a charge calling for a maximum sentence of 18 months may be confined in St. Elizabeth's for two, five or ten years—or even beyond that. Nothing less is contemplated by the statute and nothing less will fulfill the protective and rehabilitative purposes of the statute.")

Criminal Rules. That provision, which is a duplicate of Rule 11 of the Federal Rules of Criminal Procedure, reads as follows:

> "*Pleas.*—A defendant may plead not guilty, guilty, or, with the consent of the Court *nolo contendere*. The Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty."

This provision, to be sure, can hardly be regarded as a model of draftsmanship. The first sentence implies that the consent of the court is required only for a *nolo contendere* plea, while at first glance the opening clause of the second sentence might be read to suggest that the court also has broad discretion to refuse a guilty plea. However, the second clause of that sentence can be read quite plausibly to specify the sole condition upon which a guilty plea may be refused, *i.e.*, where the plea is not made voluntarily or with full understanding of the nature of the charge. Since the only alternative construction would confer an undefined discretion upon the judge, and since this would be wholly inconsistent with the traditional role of the court in dealing with guilty pleas, such a construction should be rejected.

According to the Notes of the Advisory Committee on the Federal Rules, Rule 11 of the Rules of Criminal Procedure is "substantially a restatement of existing law and practice." 18 U.S.C.A., Rules 1 to 31, p. 298. The only indication given in the Notes as to the nature of "existing law and practice" is a citation to *Fogus* v. *United States*, 34 F.2d 97 (4th Cir. 1929), which involved only the question whether a guilty plea had been entered "by a person of com-

petent intelligence, freely and voluntarily, and with a full understanding of its nature and effect, and of the facts on which it is founded." *Id.*, at 98. Doubtless the Committee was well aware that *Fogus* involved the only situation in which the courts have regarded themselves as free to reject a tendered guilty plea. The support for this statement and for our conclusion as to the proper construction of the Rule is fully presented in the brief for petitioner, and consequently we will not restate it here. We submit that, read in the light of this background, the Rule's meaning becomes clear.

2. Assuming *arguendo* that a judge may under some circumstances refuse to accept a guilty plea even though made voluntarily and with knowledge of consequences, this is not such a case.

Although we believe our view of the proper construction of Rule 9 is correct, it is not necessary for the Court to accept—or reject—that view in order to dispose of this case, since, assuming *arguendo* that there might be some circumstances that would warrant a judge's refusing to accept a guilty plea even though proferred knowingly and willingly, this is plainly not such a case.

The authorities cited in the petitioner's brief regarding the right to enter a guilty plea, as well as what we conceive to be the solidly established tradition of permitting a defendant to manage his own case, indicate that at the least a judge's refusal to accept a guilty plea must be based upon the weightiest considerations of public policy. Such considerations are not present in this case, as a comparison of the interest of the defendant and the interest of the government discloses. The defendant, with the advice of counsel, was unwilling to risk spending a lifetime in St. Elizabeth's Hospital when that could be avoided merely by pleading

guilty to two misdemeanor charges. To be sure, if the maximum punishment were imposed under section 22-1410, petitioner could have received consecutive one year sentences and fines of $1,000 on each of the charges. But even this may reasonably be regarded as a lesser sanction than indefinite confinement in an insane asylum; and in addition, it was probably reasonably predictable that no such sentence would be imposed. Under these circumstances, petitioner's interest in entering a guilty plea was strong indeed. The government's interest in trying petitioner, on the other hand, was minimal. While the government has an interest in protecting society from dangerously insane persons, that interest is safeguarded through civil commitment proceedings where the individual receives the benefit of appropriate procedural safeguards, especially where the only "danger" lies in an assumed propensity to cash bad checks. The only other interest that the government may have in refusing to permit a person to plead guilty is its interest in seeing that an innocent person is not convicted of a crime. We do not mean in any way to disparage this role of the state, but we do urge that it is not significant in his case. This function of the state derives its greatest value from the protection it gives to the person accused. Thus, arguably in another type of case the court could judge that the defendant's decision to plead guilty, while made intelligently, was against his real interests, since after all a trial could not put him in worse position than a guilty plea, and he might possibly go entirely free. In this case, however, the court's refusal to permit petitioner to plead guilty predictably placed him in a far worse position, for the alternative was not acquittal and release, but acquittal and indefinite confinement.

A dramatic demonstration of the truth of these conclusions is provided by the inversion of roles that took place during the trial of this case. While in the normal case the prosecutor no doubt would object to the court's refusing to

accept a guilty plea and thereafter would seek to establish the guilt of the defendant, in this case the government sought to establish the defendant's innocence while the defendant wanted to establish his guilt. Moreover, the defendant was forced to proceed under the burden of proof that traditionally is the prosecutor's, *i.e.*, in order to succeed, he would have had to demonstrate beyond a reasonable doubt that the crime had not been the product of his mental disease or illness, while the prosecutor had merely to raise a reasonable doubt on this issue. The anomaly of the situation could hardly be more striking.

Moreover, in weighing the competing considerations relevant to this question, the Court should, we believe, consider the grave abuses that might result from rejection of our argument. If courts could, in cases like the one at bar, reject guilty pleas, the prosecutor would be in a position, under the guise of "doing justice," to seek an acquittal on grounds of insanity in petty offense cases in order to secure the indefinite confinement of "troublesome characters." And in many cases it seems certain that this could be accomplished with ease, in view of the reversal of roles that assigns the defendant the task of proving his sanity beyond a reasonable doubt in order to stay out of the mental institution. We suggest that laws such as those governing vagrancy produce enough troublesome problems without adding to the prosecution's arsenal a new weapon to deal harshly with "undesirables" who transgress society's minor prohibitions. See Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1 (1960); Foote, *Vagrancy-Type Law and its Administration*, 104 U. of Pa.L. Rev. 603 (1956); Note, *Use of Vagrancy-Type Laws for the Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351 (1950). In saying this we perhaps should add that we do not in any way mean to imply that the prosecutor or judge in the case at bar were motivated by anything but

what they conceived of as their respective duties. Nonetheless, this is plainly no guarantee that the occasional less scrupulous prosecutor will be able to resist temptation.[29]

Other jurisdictions have recognized that the balance of interests favors leaving the raising of the insanity defense exclusively to the discretion of the defendant. The decision of the Supreme Court of Colorado in *Boyd v. The People*, 108 Colo. 280, 294, 116 P.2d 193 (1941), is directly in point. There the court unanimously ordered a commitment to a mental hospital set aside on the ground that the acquittal on grounds of insanity had been improper because the trial judge had *sua sponte* entered the plea of not guilty by reason of insanity. The court's disposition of the issue was categorical: "Under no circumstances can the Court, on its own motion, enter the plea of not guilty by reason of insanity." *Cf. Newton* v. *Commonwealth*, 333 Mass. 523, 131 N.E. 2d 749 (1956).

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[29] Without intending to impute any improper purposes to anyone involved, but only to show that the instant case is not a sport, we call attention to the following account of another trial in the District of Columbia:

> "A most striking example [of the opportunity given the prosecution] was the case of William G. Kloman [United States v. Kloman, Criminal No. 383-58, D.D.C., Feb. 15, 1960]. . . . Kloman specifically instructed his attorneys not to raise the defense of insanity. . . . Over strong defense objection, the prosecution called phychiatrists to the witness stand who presented 'some evidence' that Kloman's acts were the product of mental disorder. Then followed a curious spectacle, the defense urging 'not guilty', and the prosecution 'not guilty by reason of insanity'. . . . The jury not surprisingly found Kloman not guilty by reason of insanity, and he was committed to St. Elizabeths where he is today." Hallock, *op. cit. supra* note 2, at 316.

See also *Williams* v. *District of Columbia*, 147 A.2d 773 (D.C. Mun. Ct. App. 1956); *Commonwealth* v. *Curtis*, 318 Mass. 584, 63 N.E. 2d 341 (1945); Kimbrell, *op. cit. supra* note 20, pp. 22-23 ("Nor should any prosecutor or court be allowed to invoke the provisions of this statute by requesting or directing a verdict of not guilty by reason of insanity without the consent of the defendant, unless the defendant has pleaded insanity or introduced substantial evidence of such during the trial. The danger inherent in allowing the prosecution to raise the issue of insanity is that it will come to be an alternative 'penalty' which may be invoked for a criminal act.")

The rule of the *Boyd* case is also in effect in England, where the law has been described as being that "the issue of insanity at the time of the offense may not be raised either by the Judge or by the prosecution, but only by the defense." Report, Royal Commission on Capital Punishment, sec. 443 (1953). See also *Rex* v. *Oliver*, 6 Cr. App. 19, 20 (1910), where the Lord Chief Justice for the Court of Criminal Appeals stated:

> "The question came up seven or eight years ago, when a practice arose of the Crown calling the prison doctor to prove insanity. All the judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit." [30]

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[30] In an article written prior to the decision in the instant case, Goldstein and Katz declared flatly that the defendant "alone can raise it [the insanity defense]." *Op. cit. supra*, p. 230. And in an article written after the decision in the instant case, Krash strongly took issue with the correctness of the disposition of the issue in question. *Op. cit. supra*, pp. 938-940. In the course of his discussion, he pointed out the implications of the ruling below in terms of the right to counsel and the obligations of counsel.

> "The accused's privilege to enter a guilty plea is intimately associated with his constitutional right to counsel. The defendant may have been counseled to enter a guilty plea in the expectation that a less severe sentence will be imposed, or in order to avoid a public trial. On the other hand, a defendant may have been advised to plead guilty because of counsel's belief that the rigorous standards for release from hospital confinement can never be satisfied by the accused. [Footnote omitted.] A trial court's refusal to accept a guilty plea may, thus, seriously compromise the right to effective assistance by counsel.
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> ". . . If, as the Court of Appeals has stated, there is 'almost a positive duty' by a trial judge not to punish a mentally ill person, can counsel—who is an officer of the court—withhold information which could frustrate the performance by the court of its judicial duty? Can an attorney, who recommends a plea of insanity but is

These authorities take on added significance when it is noted that England enacted the first mandatory commitment statute—limited, however, to cases of "high treason, murder, or felony," 40 Geo. 3, c. 94 (1800)—and that Colorado is one of the few American jurisdictions that have followed suit. Colo. Rev. Stat. Ann. 39-8-4 (1960 Supp.).

The policy of the rule that only the defendant may raise the insanity defense is, as we have indicated, sound at least in the context of this case, and we submit that it should be given effect here, assuming *arguendo* that the trial judge has some discretion to refuse a guilty plea intelligently tendered, by holding that under the circumstances the judge abused that discretion.[31]

B. *The statute should be construed not to authorize confinement under the circumstances of this case.*

There are two constructions of sections 301(d) and 301(e) that are perfectly plausible and that would permit the Court to refrain from deciding the constitutional issues presented in this case.

1. The provisions are inapplicable where the defendant does not raise the insanity defense or at any rate where he wishes to plead guilty.

Sections 301(d) and 301(e) could be construed to be inapplicable where the individual does not raise the insanity

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overruled by his client, withdraw his appearance without disclosing to the court the very facts which his client wishes suppressed? And should an attorney who conscientiously believes that the welfare of his client would best be served by a plea of guilty apprise the court of the accused's mental condition? These questions are currently unresolved in the District of Columbia." *Id., at* 939, 940.

[31] Were it not that the supervisory power of this Court over lower federal courts affords the basis for such a holding, we would urge that the refusal to accept the plea constituted a denial of due process, as we believe it did.

defense or, alternatively, where he wishes to plead guilty. Either of these constructions would, as we have already indicated, reduce to some extent the magnitude of the constitutional problems, and it would be superfluous to cite the many decisions in which this Court has applied the principle that Congress should not be presumed to have acted in such a way as to raise serious constitutional issues where another construction can be given the statute. Naturally, if the statutory language were unambiguous, the course we suggest would not be open; but the fact is that the statute does not expressly provide whether the consequences it commands are to follow regardless of who it is that injects the insanity issue into the case. Moreover, the Government can hardly take the position that the statute should be read literally, since the consequence would be that there could be no commitment without an affirmative finding of insanity, as opposed to a reasonable doubt as to mental disease or defect.

As Judge Edgerton pointed out in his dissent in the recent case of *Overholser* v. *O'Beirne*,——F.2d——(Oct. 19, 1961), where the majority reaffirmed the position it adopted in the case at bar:

> "The mandatory commitment requirement and the corresponding release requirements of the District of Columbia Code, read literally, apply only when the accused is found at the trial to have been insane at the time of the offense, and therefore do not apply in the present case. The Code provides that 'If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is *acquitted solely on the ground that he was insane* at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill' . . . § 24-301(a) . . . .

> Section 24-301(e) requires, for the person's release, a certificate by the superintendent of the hospital '(1) that such person *has recovered his sanity*. . . .' Only one who was formerly insane can have 'recovered his sanity.' " Slip op., pp. 21-22.

We agree with Judge Edgerton that "if we are to interpret § 24-301 more broadly than its literal meaning, we should not go so far beyond its literal meaning as to raise serious constitutional doubts." *Id.*, at 23.

Moreover, the Report of the Committee on Mental Disorder, upon which the 1955 legislation was based and which constituted the bulk of the Senate and House Committee Reports, supports our proposed constructions. That Report contains the following statement of justification for the proposed legislation:

> "The Committee believes that a mandatory commitment statute would add much to the public's peace of mind, and to the public safety, without impairing the rights of the accused. *Where the accused has pleaded insanity as a defense to a crime,* and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable [that he be committed and confined]. . . ." H. Rep. No. 892, 84th Cong., 1st Sess., p. 13. (Emphasis supplied.)

And if the Committee was of the view, as this passage indicates, that the procedures would not be applicable to someone who, while pleading not guilty, did not attempt to take advantage of the insanity defense but was acquitted on grounds of insanity anyway, it would naturally regard in the same way the case of a person who not only refrained from raising the defense but who actually attempted to plead guilty.

Two other considerations seem to us to be relevant to the question of Congressional intent. So far as the situation of the person who wishes to plead guilty is concerned, Congress should be presumed to have legislated with awareness of the established principle that guilty pleas competently made are invariably accepted. Moreover, it should be noted that neither the person who attempts to plead guilty nor the one who does not want to raise the insanity defense is at all likely to be one accused of a felony of violence, and, as we show in the next portion of the brief, it appears that Congress' purpose in enacting the commitment law was to safeguard the community from the recurrence of serious crimes of violence.

The consequence of the approach we suggest would be not only that the Court would not have to decide the constitutional questions, but also that it could, if it saw fit, sanction the trial judge's refusal to accept the guilty plea, for, absent the consequences of mandatory commitment and continued confinement, the interest of the defendant in securing acceptance of his plea is obviously reduced in importance. Moreover, we should point out that the dissenters in the court below treated sections 301(d) and 301(e) separately, apparently assuming, at least *arguendo*, that the initial commitment of petitioner was proper but concluding that continued confinement was improper. See also Judge Fahy's concurring opinion in *Ragsdale* v. *Overholser*, *supra*, at 949. While we, of course, take the position that the initial comittment was also invalid, it is quite true that the Court need not reach that question if it construes the release provision as inapplicable and holds that, assuming *arguendo* the validity of the initial commitment, petitioner could not be held for longer than the time required to make the examination necessary to institute civil commitment proceedings.

2. The provisions are inapplicable where the crime charged is a non-violent misdemeanor.

As we have indicated, the constitutional issues would be somewhat less grave in a case where the crime of which the individual was acquitted was a felony of violence, since arguably society's interest in protecting itself against such crimes, which inflict harm that is in a sense non-compensable, is greater than its interest in protecting itself against non-violent misdemeanors. Consequently, there is some reason for construing the statute not to apply where the crime charged is a non-violent misdemeanor. Moreover, the language of section 301(e) suggests such a construction, for it provides that release is to hinge in part upon a showing that the individual will not be "dangerous" to himself or others, and this word probably is more generally used when some sort of physical danger is involved. One would be more likely to say, for example, that a dangerous rapist is on the loose than that a dangerous bad check writer is on the loose. Finally, the Report of the Committee on Mental Disorder contains the following revealing statement concerning the problems with which the 1955 legislation was designed to deal:

> ". . . [T]he public has a very great interest in assuring, and in being assured, that this question [whether the person has recovered his sanity and is no longer dangerous] is correctly determined, and that dangerous mental cases are not prematurely released to prey upon the citizenry. The newspapers of the Nation, in recent times, have contained many accounts of persons relieved of criminal responsibility by reason of insanity and who have been prematurely released from mental hospitals only to commit some further serious crime,

many of them involving rape and/or murder." H.Rep. No. 892, 84th Cong., 1st Sess., p. 13.

In view of these considerations, we regard the position of the dissenting judges below, who adopted the suggested construction of the statute, as wholly valid.[32] See also the concurring opinion of Judge Bazelon in *Overholser* v. *Russell*, 283 F.2d 195, 198 (1960); the concurring opinion of Judge Fahy in *Ragsdale* v. *Overholser*, *supra*, at 949; and the dissenting opinion of Judge Edgerton in *Overholser* v. *O'Bierne*, *supra*, at 20. As Judge Fahy put it in his dissent in the instant case:

> ". . . Congress in section 301(e) is not concerned with persons who have engaged in any kind of unlawful conduct, however minor, but only with persons who have engaged in unlawful conduct of a dangerous character. The language used conveys the idea of physical danger to persons and, perhaps, to property. I do not attempt to delineate precisely the boundaries fixed by the language used, but obviously they do not encompass any and every minor conflict with the law of which a person has been acquitted because of a doubt about his sanity. Had Congress intended such a broad coverage, it would have used broader language such as 'likely to engage in unlawful conduct,' rather than the narrow language of section 301(e), 'dangerous to himself or others.'
>
> "Our jurisprudence knows no such thing in times of peace as 'preventive' or 'protective' custody of persons not guilty of crime and not found to be of unsound mind. Congress, of course, was aware of this and did

[32] Again, it might be possible to separate the two statutory provisions so that initial commitment would be considered *arguendo* valid. See *supra*, p. 53.

not cloud its enactment with grave constitutional doubts by requiring a person of sound mind to be held under restraint in a mental institution on a theory he had done an act having the elements of a minor and non-dangerous offense. [Footnote omitted.] The most serious constitutional doubts are avoided by giving the provisions of section 301(e) their natural meaning which excludes non-dangerous conduct." 288 F.2d, at 397.

V. Other Constitutional Grounds for Reversing the Judgment

The arguments presented in the preceding portions of this brief are directed to what we conceive to be the most obvious grounds for reversal of the judgment. However, there are other sound reasons supporting our position that the Court might regard as affording a preferable basis for deciding the case.

A. *Psychiatric evidence at government expense should have been made available to petitioner.*

The government offered the testimony of a psychiatrist to establish a reasonable doubt as to whether petitioner's crime had been the product of mental illness or disease. Defendant, who was indigent, was naturally unable to rebut this testimony with the testimony of any other psychiatrist. Where the burden of proof upon a defendant is as high as it was in this case, and where expert testimony obviously plays a dispositive role, we believe that the principles of *Griffin* v. *Illinois*, 351 U.S. 12 (1956), *Burns* v. *Ohio*, 360 U.S. 252 (1959), *Farley* v. *United States*, 354 U.S. 521 (1957), *Ellis* v. *United States*, 356 U.S. 674 (1958); *Johnson* v. *United States*, 352 U.S. 565 (1957), *Eskridge* v. *Washington Prison Bd.*, 357 U.S. 214 (1958), and *Smith* v. *Bennet*, 365

U.S. 708 (1961), require that such testimony be made available to defendant. We are hard pressed to see any distinction between the government's constitutional obligation to provide an indigent defendant with a record where that is necessary for adequate appellate review and its duty to make it possible for defendant to present a meaningful defense on the issue of insanity.

B. *Petitioner was deprived of adequate notice.*

There was no reason whatsoever for the defendant or his counsel to anticipate that his guilty plea would not be accepted and that instead he would be placed in the position of having to establish his sanity beyond a reasonable doubt. Nor was there any continuance of the trial after the guilty plea had been rejected. Consequently, the most reasonable inference is that petitioner did not receive adequate notice of the fact that he would have to introduce evidence—and overpowering evidence at that—upon the issue of sanity. Where the circumstances establish such a strong probability of absence of notice, the general presumption of regularity of proceedings should not, we submit, apply. As the dissenting judges below put it:

> ". . . We have no transcript of what occurred, and so we cannot accurately reconstruct the events . . . . [W]e cannot say here, that a fair trial was held in the Municipal Court, with opportunity for appellee to meet the government's case. As near as we can make out from the data we have, the case was turned into an inquiry concerning appellee's sanity at the time the checks were cashed. The evidence consisted of the testimony of a psychiatrist that appellee was of unsound mind at that time. Appellee and his counsel were thus confronted with a serious situation affect-

ing appellee, and the record does not show they were given a reasonable opportunity to cope with it by showing appellee was not of unsound mind when the checks were cashed. In the absence of that opportunity, there could be no valid finding that he was not guilty by reason of insanity. . . .

". . . [T]he preferable remedy, especially where, as here, more than a year has passed in which the petitioner has been in restraint, is not to order a second District Court hearing about what occurred at the Municipal Court trial . . . but to set aside the commitment." 288 F.2d, at 395-396.

C. *Petitioner was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment.*

While it is conceded that counsel was appointed for petitioner shortly before the trial (though the record does not so state), it is clear that, prior to that time, petitioner was not afforded the right of representation. The record indicates that, on the same day the trial court ordered a mental examination of petitioner, defendant waived the right to be represented by an attorney. (R. 21) Obviously this waiver was not competent, in view of the later report from the hospital declaring that petitioner was of unsound mind, although he had "shown some improvement since his admission," *i.e.*, since the time he had purportedly waived the right to counsel.

Petitioner was entitled under the Constitution to "the guiding hand of counsel at every step in the proceedings against him," *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). Obviously the arraignment and the proceedings that related to petitioner's commitment to the General Hospital for observation were "step[s] in the proceedings against him." And, although we take it to be established that in cases

arising in federal courts no specific prejudice need be shown where there is a deprivation of the right to counsel, such prejudice would not be difficult to find here. For example, counsel might have objected successfully to the hospital report's containing a finding as to petitioner's sanity at the time of the crime, inasmuch as this went beyond the requirements of the statute governing pre-trial examinations and reports. D.C. Code, 24-301(a). Moreover, the report in question was submitted by the Assistant Chief Psychiatrist of the hospital, rather than, as section 24-301(a) specifically requires, the Chief Psychiatrist, and such an error has been held by the Municipal Court of the District of Columbia to invalidate the commitment. *Leslie Driscoll* v. *Overholser* (unreported).[33]

It is true that this issue was not presented in the petition for habeas corpus or in the petition for certiorari. However, we know of no jurisdictional bar to the Court's considering the issue at this time; under Rule 40(1)(d)(2) the Court may "at its option . . . notice a plain error not presented [in the petition for certiorari]"; and the error here is not only plain, but effects constitutional rights.

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[33] While the case is unreported, an account of it appears in the *Washington Post* of Oct. 30, 1960, p. G11.

Conclusion

For the foregoing reasons the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed and respondent should be ordered to discharge petitioner from custody forthwith.

Respectfully submitted,

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APPENDIX

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

Section 24-301 of the D.C. Code, 69 Stat. 609, reads as follows:

> "(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital

for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial the court shall order the accused confined to a hospital for the mentally ill.

"(b) Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial, unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial.

"(c) When any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

"(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

"(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate

is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided*, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

"(f) When an accused person shall be acquitted solely on the ground of insanity and ordered confined in a hospital for the mentally ill, such person and his estate shall be charged with the expense of his support in such hospital.

"(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

"(h) The provisions of this section shall supersede in the District of Columbia the provisions of any Federal statutes or parts thereof inconsistent with this section."

Rule 9 of the Municipal Court Criminal Rules reads as follows:

"*Pleas.*—A defendant may plead not guilty, guilty or, with the consent of the Court *nolo contendere*. The Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty."